Study K-410 March 11, 1998

Memorandum 98-14

Confidentiality of Settlement Negotiations:
Revised Draft Tentative Recommendation

At the January meeting, the Commission directed the staff to prepare a revised tentative recommendation on Protecting Settlement Negotiations. This draft would protect settlement negotiations to a greater extent than the earlier recommendation that was circulated last year.

Subject to specified exceptions, evidence of settlement negotiations would be flatly inadmissible, not just inadmissible against the person attempting to compromise. Where the parties to the negotiations agree in writing that their negotiations will be subject to the statute, the negotiations are confidential and protected from discovery, with certain exceptions. In contrast, the tentative recommendation circulated last year did not make settlement negotiations confidential, and did not provide as much protection from discovery. What protection from discovery there was, however, applied automatically, without the need for a written agreement.

In preparing the current draft, the staff considered the Commission's strong sentiments in favor of protecting settlement negotiations, as well as its advice to explore whether the protection against discovery should be triggered only if the parties agree in advance that their negotiations are confidential. We also took into account a recent letter from the Judicial Council's Civil and Small Claims Advisory Committee (Exhibit pp. 1-2), restudied the input previously received, and reviewed academic literature on the pros and cons of settlements and processes used to encourage settlement.

Staff notes in the draft raise issues on specific provisions. The remainder of this memorandum (1) briefly summarizes the academic literature on settlement and (2) explains why the draft would require a written agreement to invoke confidentiality and protection from discovery, instead of providing such protection automatically.

"It is a truism that the law favors a policy of settlement and compromise." Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 Hastings L.J. 1, 3 (1992); *see also* Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings L.J. 9, 36-41 (1996). In a survey of California judges and court administrators, "the near unanimous preference was for more cases to settle, for cases to be settled earlier in the process, and for settlements to maximize fairness and creativity." Folberg, Rosenberg & Barrett, *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. Rev. 343, 357 (1992). Similarly, University of Michigan law school professors Samuel Gross and Eric Syverud recently commented:

> A trial is a failure. Although we celebrate it as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one. With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial.
>
> [Gross & Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319, 320 (1991); *see also* Gross & Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. Rev. 1, 1-4 (1996).]

Commentators Marc Gallanter and Mia Cahill have summarized the reasons for encouraging settlement as follows:

> **A. The Party-Preference Arguments**
>
> 1. Party pursuit: Settlement (rather than adjudication) is what the parties seek. In other words, they "vote with their feet."
>
> 2. Party satisfaction: Settlement leads to greater party satisfaction.
>
> 3. Party needs: Settlement is more responsive to the needs or underlying preferences of parties.
>
> **B. The Cost-Reduction Arguments**
>
> 4. Party savings: Settlement saves the parties time and resources, and spares them unwanted risk and aggravation.
>
> 5. Court efficiency: Settlement saves the courts time and resources, conserving their scarce resources (especially judicial attention); it makes courts less congested and better able to serve other cases.

C. The Superior-Outcome Arguments

6. Golden mean: Settlement is superior because it results in a compromise outcome between the original positions of the parties.

7. Superior knowledge: Settlement is based on superior knowledge of the facts and the parties' preferences.

8. Normative richness: Settlement is more principled, infused with a wider range of norms, permitting the actors to use a wider range of normative concerns.

9. Inventiveness: Settlement permits a wider range of outcomes, greater flexibility in solutions, and admits more inventiveness in devising remedies.

10. More compliance: Parties are more likely to comply with dispositions reached by settlement.

11. Personal transformation: The process of settlement qualitatively changes the participants.

D. Superior General Effects Arguments

12. Deterrence: Information provided by settlements prevents undesirable behavior by affecting future actors' calculations of the costs and benefits of conduct.

13. Moral education: Settlements may influence estimations of the rightness or feasibility of various sorts of behavior.

14. Mobilization and demobilization: By defining the possibilities of remedial action, settlements may encourage or discourage future legal actors to make (or resist) other claims.

15. Precedent and patterning: Settlements broadcast signals to various audiences about legal standards, practices and expectations.

[Gallanter & Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1350-51 (1994).]

Although settlement is widely regarded as desirable, it is not without critics. *See, e.g.*, Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984). In an essay defending settlement, Carrie Menkel-Meadow (law professor at UCLA and Georgetown University) summarizes the situation as follows:

> …Trina Grillo and others have argued against mediation (in divorce cases and other family matters involving women); Richard Delgado and others have questioned whether informal processes are unfair to disempowered and subordinated groups; Judith Resnik has criticized the (federal) courts' unwillingness to do their basic job of adjudication; Stephen Yeazell has suggested that too much settlement localizes, decentralizes, and delegalizes dispute resolution and the making of public law; Kevin C. McMunigal has

> argued that too much settlement will make bad advocates; and David Luban and Jules Coleman, among other philosophers, have criticized the moral value of the compromises that are thought to constitute legal settlements.
>
> [Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases),* 83 Geo. L.J. 2663, 2663-64 (1995).]

If the Commission would find it helpful, the staff can describe these arguments (and the arguments in favor of settlement) in greater detail. It is difficult to dispute, however, that "[s]ettling pending cases is not an unqualified good." *Bundy*, *supra,* 44 Hastings L.J. at 78. For example, David Luban (University of Maryland law professor) questions where we would be if *Brown v. Board of Education* had settled quietly out of court. Luban, *Settlements and the Erosion of the Public Realm,* 83 Geo. L.J. 2619, 2629 (1995). Commentators have also pointed out that

> [h]igh case costs and the frustration and uncertainty generated by delayed or rescheduled hearings create enormous pressure on parties to settle so that they can at least cut their losses and attend to other priorities. … Settlements resulting from this kind of pressure are seldom satisfactory, especially after litigants have made large investments in the litigation process. Over ninety percent of all civil cases filed in California settle or are otherwise disposed of prior to trial, but a high percentage of settlements occur "on the courthouse steps," or shortly before trial.
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> [Folberg, Rosenberg & Barrett, *supra,* 26 U.S.F. L. Rev. at 350-51.]

The trend in the academic literature has been to focus not on "is settlement good?," but on "how much settlement is desirable?" and "what types of settlements are desirable?" *See, e.g.,* Luban, *Settlements and the Erosion of the Public Realm,* 83 Geo. L.J. 2619 (1995); Gallanter & Cahill, *supra;* Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Settlement Conference,* 33 U.C.L.A. L. Rev. 485, 505 (1985). This flows from recognition that (1) a world without settlement would be "unthinkable," Luban, *supra,* 83 Geo. L.J. at 2640, and (2) "settlement is not an 'alternative' process, separate from adjudication, but is intimately and inseparably entwined with it," Gallanter & Cahill, *supra,* 33 U.C.L.A. L. Rev. at 1389.

ANALYSIS

How do these academic policy discussions relate to the Commission's proposal to increase the confidentiality of settlement negotiations? In the staff's view, they justify continuing with the proposal, but also suggest exercising a degree of caution.

Although there are strong policy reasons for encouraging settlement, there are also detriments to creating a privilege. Facilitating the ascertainment of truth in legal proceedings is a compelling public need. Garstang v. Superior Court, 39 Cal. App. 4th 526, 532, 46 Cal. Rptr. 2d 84 (1995). Privileges deprive factfinders of relevant information. Thus, courts may not expand statutory privileges except as constitutionally required, nor may they imply unwritten exceptions to the statutory privileges. Roberts v. City of Palmdale, 5 Cal. 4th 363, 373, 853 P.2d 496, 20 Cal. Rptr. 2d 330 (1993).

Wigmore's test for justifying a privilege is:

> (1) The communication must originate in a confidence that it will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

Whether settlement negotiations meet this test is debatable. The first element, whether settlement communications originate in a confidence that they will not be disclosed, likely depends in part on the state of the law: If the law ensures confidentiality, there will be an expectation of confidentiality. As noted at page 5 of the attached draft, however, even now disputants sometimes expect that the protection for evidence of settlement negotiations is absolute.

Wigmore's second element is whether confidentiality is essential to the relationship between the parties. In the context of settlement negotiations, the issue should be characterized somewhat differently: Whether confidentiality is essential to effective settlement negotiations. This is in part an empirical issue, but such evidence is difficult to gather. The answer also turns on one's view of what it means for settlement negotiations to be "effective": Is it enough if the negotiations result in a settlement? Is an early settlement superior to a settlement

on the courthouse steps? Are settlements based on full information, crafted to meet the needs of the parties, better than other settlements?

It is reasonable to assume, however, parties will be more candid in settlement discussions if they have assurance that their words or actions will not later be used against them. Candor, in turn, is likely to lead to enhanced understanding of each other's positions, improving prospects of reaching a mutually satisfactory and durable settlement, well-tailored to the parties' needs. *See, e.g.*, Menkel-Meadow, *supra*, 83 Geo. L.J. at 2683 ("When representatives in a dispute have constituencies of widely different views of the case, and when meeting with the 'enemy' itself is considered a signal of weakness, negotiations will simply not occur unless they can be held in privacy."); Folberg, Rosenberg & Barrett, *supra*, 26 U.S.F. L. Rev. at 358 (according to California judges surveyed, one reason attorneys do not settle until they reach the courthouse steps is "fear that offers to compromise will be used against their clients later").

Wigmore's third element, whether the community believes the relationship should be "sedulously fostered," again requires adjustment for the settlement context. The proper question is whether the community believes that settlement (or certain types of settlement) should be strongly encouraged.

The answer is fairly clear. Although there has been some (primarily academic) criticism of the trend towards encouraging settlement, the weight of authority is in the other direction. *See, e.g.*, Gross & Syverud, *supra*, 90 Mich. L. Rev. at 320. Moreover, to the extent that we should not blindly encourage settlement, but rather promote "desirable" settlements, it seems probable that settlements based on candid exchange of information are more likely to be mutually satisfactory and durable than settlements based on guesswork as to the other side's views. Also, early settlements minimize costs to the parties and the state, and "allow courts to be available on a timely basis when needed for the trial of cases that do not settle." Folberg, Rosenberg & Barrett, *supra*, 26 U.S.F. L. Rev. at 351. Promoting candor by assuring confidentiality may facilitate prompt settlement, as opposed to pressured settlement on the courthouse steps.

Finally, Wigmore's test calls for assessment of whether the detrimental effects of disclosing settlement negotiations outweigh the benefits to be gained by allowing admission of such evidence. This again involves empirical issues on which little data is available: Does disclosure discourage candor in future settlement negotiations? Do more candid negotiations really result in more or

better settlements? It also involves a balancing of priorities, which reasonable persons could decide differently.

In short, applying Wigmore's analysis seems to support the Commission's approach, but not unequivocally. Other factors also suggest that it may be prudent to proceed with a measure of restraint, particularly with regard to discovery and confidentiality of settlement negotiations.

For instance, Professor Leonard would not protect settlement negotiations from discovery:

> [T]he premise that excluding evidence of compromise promotes settlement is largely untested. It is likely that a good deal of settlement will occur even if there is no exclusionary rule. Moreover, compromise evidence is often relevant and sometimes has high probative value. Making the evidence generally discoverable might discourage some settlement behavior, but most likely to no greater extent than already occurs as a result of the many "exceptions" to the exclusionary rule. Also, if you choose to restrict discovery of compromise evidence, it is difficult to justify not also doing so with respect to evidence of subsequent remedial measures. At the very least, you can expect litigants to make such arguments.
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> [Second Supplement to Memorandum 96-59, Exhibit p. 3.]

The State Bar Litigation Section questions the need for extensive reform. It suggests making settlement negotiations confidential only upon agreement of the parties:

> If the parties wish to avail themselves of a strict rule of confidentiality, they should expressly agree to be bound in a specified form of agreement or to a specified form of alternative dispute resolution. Absent such express agreement, the general standards under the Evidence Code sections 1152 and 1154 should apply.
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> [First Supplement to Memorandum 96-59, Exhibit p. 1.]

The State Bar Committee on Administration of Justice agrees (Memorandum 97-10, Exhibit pp. 1-3), as does the Judicial Council's Civil and Small Claims Advisory Committee (Exhibit p. 1).

There is precedent for the Litigation Section's proposal in the Commission's own work. When Evidence Code Section 1152.5 (the mediation confidentiality statute) was enacted on the Commission's recommendation in 1985, the provision applied only where "before the mediation begins, the persons who

agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation." 1985 Cal. Stat. ch. 731, § 1. That requirement was removed in 1993, apparently because some persons considered it burdensome. Nonetheless, the approach deserves consideration where a new type of confidentiality provision is being introduced.

But Wayne Brazil (Magistrate Judge, U.S. District Court, Northern District of California) sees serious problems with the approach:

> I disagree vigorously with the position taken by the State Bar Committee on Administration of Justice in its letter of January 22, 1997. The notion that the best way to address these issues is to say nothing and to offer protection only when the parties to settlement negotiations agree in advance to a specific form of a confidentiality contract strikes me as counterproductive. For one thing, this approach would generate yet another matter about which lawyers would be constrained to negotiate before they began negotiating about the substance of settlement proposals. Creating additional points of potential friction is not conducive to advancing settlement generally and would cost clients more money. Such an approach also would create uncertainty about the status of inquiries designed only to raise the issue of settlement, or to see if an opponent has any interest at all in even the most tentative, exploratory conversation about whether there is any reason to set up a serious negotiation. In other words, I believe that if the law moved toward the notion that no protection exists unless there is a clear contract in advance, there would be more fear even of raising the subject of settlement and less settlement activity. I believe that adding a set of statutory provisions that address these matters directly and that define the circumstances under which protection would presumptively attach is likely to much better advance society's interest both in promoting settlement and in reducing expense and delay in civil litigation.
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> [Memorandum 97-74, Exhibit pp. 2-3.]

How do we reconcile these positions and concerns? The attached draft attempts to do so by making the protection against admissibility of settlement negotiations automatic, but triggering confidentiality and protection against discovery only where there is an advance written agreement invoking such statutory protection. This responds in part to Judge Brazil's concerns, because some protection would exist even where the parties do not or cannot negotiate a clear contract in advance. The approach also takes into account the view,

expressed by the State Bar groups and the Civil and Small Claims Advisory Committee, that settlement negotiations should be confidential only where the parties agree on such protection. The staff believes that this combination approach is more likely to gain approval than a proposal providing a blanket privilege for settlement negotiations.

Alternatively, the Commission may also want to consider limiting its reform to admissibility, perhaps only in civil cases. In particular, confidentiality (as opposed to protection from discovery) is a potentially controversial area, one that the Commission carefully avoided in its recent bill on mediation communications. (Memorandum 96-75, pp. 15-17; Memorandum 97-33, p. 5.) While a reform limited to admissibility would not be as dramatic as creating a privilege for settlement negotiations, it would still be a step forward, promoting candor in settlement negotiations, bringing the law more in line with common expectations, and preventing disingenuous use of compromise evidence. See pages 5-6 of the attached draft.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

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February 13, 1998

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Dear Ms. Gaal:

I am writing on behalf of the Judicial Council's Civil and Small Claims Advisory Committee, which I chair. At its February 4, 1998 meeting, the committee reviewed with interest the California Law Revision Commission's study on the confidentiality of settlement negotiations.

The committee had several comments it wished me to convey to you.

First, the committee was concerned that the California Law Revision Commission may be acting prematurely. The committee members were not aware of any actual problems with the current Evidence Code provisions on the confidentiality of settlement negotiations. If real-world problems or abuses do exist, the committee would be very interested in hearing about them.

Second, if the California Law Revision Commission does decide to move forward with a proposal on the confidentiality of settlement negotiations, the committee agrees with all of the comments offered by the Litigation Section of the State Bar.

Finally, the committee is concerned that if the California Law Revision Commission puts forward any proposed revisions to the current statutes, the commission should be mindful of the effects of its recommendations on particular types of litigation. For instance, in the draft proposal presented to us, the commission proposed a broad confidentiality provision excepting certain types of issues (such as misconduct, good faith settlement, and Mary Carter agreements). However, the

commission did not expressly exclude from the broad confidentiality provisions evidence of bad faith by an insurance company. In first party bad faith insurance cases, evidence of "low-ball" settlement offers is often a prime indicator of bad faith by the insurance company and in many cases it becomes a centerpiece of the evidence. The committee feels that the commission should not recommend changes which would alter the well-established caselaw on first party bad faith insurance litigation.

Very truly yours,

Richard D. Aldrich
Chair, Civil and Small Claims
Advisory Committee

RDA:WJB:rp
cc: Wendi J. Berkowitz, Committee Counsel

#K-410

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

REVISED TENTATIVE RECOMMENDATION

Protecting Settlement Negotiations

March 1998

This **revised** tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **May 31, 1998.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

The California Law Revision Commission recommends reform of evidentiary provisions governing the admissibility of negotiations to settle a civil case (Evidence Code Sections 1152 and 1154). The proposal seeks to foster candid and productive settlement negotiations by making offers of compromise and other settlement overtures generally inadmissible against the person seeking to compromise. Subject to specified exceptions, it would also make settlement negotiations confidential and protect evidence of such negotiations (other than a settlement agreement) from discovery, but only where the parties agree in advance in writing that this statutory protection should apply.

This recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

PROTECTING SETTLEMENT NEGOTIATIONS

A frank settlement discussion can help disputants understand each other's position and improve prospects for successful, mutually satisfying settlement of the dispute. A gesture of conciliation or other step towards compromise can increase the likelihood of reaching an agreement. Yet parties can be reluctant to talk openly or act freely in a settlement discussion if their words or actions will later be used against them.

Existing law addresses this concern to a limited extent by making evidence of efforts to settle a civil case inadmissible to prove or disprove liability for the damage that is the subject of the negotiations.[1] Having reexamined the existing law, the Law Revision Commission recommends increasing the confidentiality of an ordinary settlement negotiation. Encouraging candid and rational negotiations will further the administration of justice by promoting durable settlements.

(This tentative recommendation replaces an earlier proposal on the same subject that was circulated in 1997.)

EXISTING LAW

Two statutory provisions protect a settlement negotiation (other than a mediation).[2] Evidence Code Section 1152 prohibits proof of liability based on an offer to compromise the alleged loss:

> 1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing,

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1. See Evid. Code §§ 1152, 1154. All further statutory references are to the Evidence Code, unless otherwise indicated. Sections 1152 and 1154 were used as a basis in drafting the corresponding federal provision, Federal Rule of Evidence 408. *See* Fed. R. Evid. 408 advisory committee's note.

For evidentiary protection of plea bargaining, see Sections 1153 (offer to plead guilty or withdrawn guilty plea), 1153.5 (offer for civil resolution of crimes against property). For settlement of an administrative adjudication, see Gov't Code § 11415.60.

2. For provisions governing mediation, see Sections 703.5 (mediator competency to testify) and 1115-1128 (mediation confidentiality). See also Appendix 5 to the *1997-1998 Annual Report*, 27 Cal. L. Revision Comm'n Reports 531, 595 (1997); *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996).

The protection for settlement negotiations recommended in this proposal is not as strong as the protection for mediation communications. In a mediation, the involvement of a neutral person may promote productive discourse and exploration of new approaches to settlement. Because planning and participating in a mediation involves substantial expense and effort, a mediation usually is a serious effort to settle. A party may also disclose information to the mediator without having to disclose it directly to the other side. These special attributes of mediation increase the likelihood of successful settlement, and thus the likelihood of a benefit that offsets the cost of according complete confidentiality to the discussion. The involvement of the mediator may also deter misconduct that might otherwise occur in a setting of complete confidentiality. Finally, the beginning and end of a mediation are clearer than the boundaries of what is and is not a settlement negotiation, making it is easier to determine which communications are protected. For further comparison of mediation with unassisted settlement negotiations, see Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value Added" For Negotiators*, 12 Ohio St. J. on Disp. Resol. 1 (1996).

> act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

To ensure the "complete candor between the parties that is most conducive to settlement," this provision protects not only an offer of compromise, but also any conduct or statements made during negotiations for settlement of a claim.[3]

Although broad in that respect, the existing law is limited in others. There are exceptions for certain categories of evidence.[4] More importantly, an offer to compromise or any associated conduct or statement is only inadmissible "*to prove liability* for the loss or damage to which the negotiations relate."[5] If a party offers the evidence for another purpose, such as to show bias, motive, undue delay, knowledge, or bad faith, the restriction does not apply.[6]

The second provision, Section 1154, prohibits disproof of a claim through an offer to discount the claim:

> 1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

Like Section 1152, this provision encompasses both an offer to discount a claim and any associated conduct or statement. But the evidence is inadmissible only if a party offers it to disprove the claim.

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3. Commission Comment to Section 1152, as enacted in 1965 (originally printed in *Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1001, 1213 (1965)).

4. Section 1152(b)-(c) provides:

> (b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.3 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving additur or remittitur, or on appeal.
>
> (c) This section does not affect the admissibility of evidence of any of the following:
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> (1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.
>
> (2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

5. Young v. Keele, 188 Cal. App. 3d 1090, 1093, 233 Cal. Rptr. 859 (1987) (emph. in original).

6. *See, e.g.*, California Physicians' Service v. Superior Court, 9 Cal. App. 4th 1321, 1327, 12 Cal. Rptr. 2d 95 (1992) ("Where the matter is offered not to establish initial liability, but only as evidence of bad faith in administering the claim (i.e., the making of a ridiculously low offer) the evidence is not excluded."); Moreno v. Sayre, 162 Cal. App. 3d 116, 126, 208 Cal. Rptr. 444 (1984) ("While evidence of a settlement agreement is inadmissible to prove liability (see Evid. Code, § 1152), it is admissible to show bias or prejudice of an adverse party.").

Neither Section 1152 nor Section 1154 expressly addresses the discoverability of a settlement discussion.[7] Case authority on whether existing law restricts discovery of offers to compromise, offers to discount a claim, and associated conduct and statements (hereinafter, "evidence of settlement negotiations") is sparse and ambiguous.[8]

JUSTIFICATION FOR PROTECTING SETTLEMENT NEGOTIATIONS

Justifications for evidentiary protection of settlement negotiations include the public policy of promoting settlements, fairness, and relevancy.[9]

Public Policy of Promoting Settlements

The prevailing rationale for excluding evidence of settlement negotiations is the strong public policy favoring settlements.[10] Settlements improve relationships and reduce litigation expenses.[11] If effective restrictions are in place, the parties can speak freely, knowing that their words and actions will not be used against them. Instead of engaging in "an irrational poker game," they can share the reasoning

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7. In contrast, Section 1119 (mediation confidentiality) expressly addresses the admissibility, confidentiality, and discoverability of mediation communications.

8. In *Covell v. Superior Court*, the court concluded that "the statutory protection afforded to offers of settlement does not elevate them to the status of privileged material." 159 Cal. App. 3d 39, 42, 205 Cal. Rptr. 371 (1984). Nonetheless, the court ruled that the trial court abused its discretion in granting discovery of settlement offers. *Id.* at 42-43. This may mean that there is a stiffer standard for discovery of a settlement negotiation than for discovery of other materials. *See* Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 1002 (1988).

9. Another rationale, known as the contract theory, holds that a settlement offer is inadmissible because it is a promise without consideration. This theory has never gained acceptance in the United States and "has little merit." D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.3.1, at 3:26-27 (1996).

10. *See, e.g.*, Fed. R. Evid. 408 advisory committee's note; Brazil, *supra* note 8, at 958-59; Leonard, *supra* note 9, § 3.3.3, at 3:33 ("this general rationale has for many years been widely supported by the commentators as the primary justification for the exclusionary rule and the cases following that view are legion"). The policy of promoting settlement has received some criticism, primarily from academics. See Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*,, 83 Geo. L.J. 2663, 2663-64 (1995) (collecting authorities). But the overwhelming weight of authority holds that settlements are essential. See, e.g., Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings L.J. 9, 36 (1996) ("The public policy favoring settlement of disputes has generally received enthusiastic support from the commentators and the courts"); Folberg, Rosenberg & Barrett, *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. Rev. 343, 357 (1992) (in a survey of California judges and court administrators, "the near unanimous preference was for more cases to settle, for cases to be settled earlier in the process, and for settlements to maximize fairness and creativity"); Gross & Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319, 320 (1991) ("With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial").

11. McClure v. McClure, 100 Cal. 339, 343 (1893); Skulnick v. Mackey, 2 Cal. App. 4th 884, 891, 3 Cal. Rptr. 2d 597 (1992).

underlying their positions, enhancing the likelihood of reaching a mutual understanding and eventual settlement.[12]

Fairness

Fundamental fairness is another reason for excluding evidence of settlement negotiations. Making an offer to settle a contentious dispute is often emotionally difficult. To use evidence of it against the would-be compromiser would unfairly penalize that person for taking a hard step towards resolution of the dispute.[13]

Relevancy

The relevancy theory holds that courts should exclude evidence of settlement negotiations because such evidence is irrelevant or of little probative value in establishing liability. Instead of reflecting the merits of the claim, the offer may just reflect a desire to avoid costly litigation expenses and achieve peace.[14]

The strength of this argument varies from case to case, depending on the amount of the offer relative to the size of the claim,[15] the projected litigation expenses, and other factors. The argument does not support exclusion of statements made in settlement negotiations.[16] Thus, the relevancy theory is not independently sufficient to justify provisions such as Sections 1152 and 1154.[17] To some extent, however, it supplements the other rationales for excluding evidence of settlement negotiations.

PROBLEMS WITH EXISTING LAW

The fairness rationale and public policy of promoting settlements justify protection of settlement discussions, but provisions like Sections 1152 and 1154 do not fully achieve that goal.

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12. Brazil, *supra* note 8, at 959-60; *see also* Menkel-Meadow, *supra* note 10, at 2683 ("When representatives in a dispute have constituencies of widely different views of the case, and when meeting with the 'enemy' itself is considered a signal of weakness, negotiations will simply not occur unless they can be held in privacy"); Folberg, Rosenberg & Barrett, *supra* note 10, at 358 (according to California judges surveyed, one reason attorneys do not settle until they reach the courthouse steps is "fear that offers to compromise will be used against their clients later").

13. Leonard, *supra* note 9, § 3.3.4, at 3:35-36. The fairness rationale is independent of, but interrelated with, the public policy of promoting settlements. Penalizing a person who seeks compromise is not only unfair, but also inconsistent with the goal of encouraging settlements. Carney v. Santa Cruz Women Against Rape, 221 Cal. App. 3d 1009, 1023, 271 Cal. Rptr. 30 (1990).

14. J. Wigmore, Evidence in Trials at Common Law § 1061(c), at 36 (J. Chadbourn ed. 1972).

15. Fed. R. Evid. 408 advisory committee's note. Relevancy is not a persuasive basis for excluding evidence that a party offered to pay nine tenths of a claim, because the party probably would not have made such an offer without considering the claim strong. Similarly, relevancy is not grounds for excluding evidence that a plaintiff offered to accept only one tenth of the damages sought. It is unlikely that the plaintiff would have been satisfied with so little if the plaintiff regarded the claim as wholly valid. Louisell & Mueller, Federal Evidence § 171, at 454 (1985).

16. Brazil, *supra* note 8, at 958.

17. *See, e.g.*, Leonard, *supra* note 9, § 3.3.2, at 3:30 ("the relevancy theory for excluding compromise evidence is generally invalid").

In the past decade, courts and commentators have increasingly emphasized that out-of-court settlements are critical if the justice system is to function effectively.[18] The vast majority of civil cases settle before trial. If they did not, the backlog in the courts would become intolerable.[19] Settlements, particularly early settlements, not only reduce court backlogs and conserve court resources, but also spare disputants the expense, uncertainty, and stress of litigation. "The need for settlements is greater than ever before."[20]

Candor is often crucial in a settlement discussion and assurance of confidentiality is usually essential to candor.[21] Under Sections 1152 and 1154, such assurance is limited, because evidence of settlement negotiations is admissible for any purpose except proving or disproving liability.[22]

Misconceptions about the extent of the protection also exist. Disputants sometimes fail to realize that the protection for evidence of settlement negotiations is not absolute, but only excludes such evidence on the issue of liability.[23] The consequences can be severe. A party's admission in settlement negotiations, made on the assumption that it would be inadmissible, may become critical evidence against the party at trial and may later form the basis of a malpractice claim.

Finally, evidence of settlement negotiations that is ostensibly introduced for another purpose tends to be prejudicial as to liability, even with the use of a limiting instruction. Frequently, this is the motive for introducing such evidence.[24] Regardless of whether a party offers evidence of settlement negotiations

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18. *See, e.g.,* Neary v. Regents of University of California, 3 Cal. 4th 275, 278, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992); Leonard, *supra* note 9, § 3.1, at 3:2-3 & 3:2 n.2.

19. Brazil, *supra* note 8, at 959.

20. Neary v. Regents of University of California, 3 Cal. 4th 275, 277, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992). For further discussion of the advantages of settlements, see Menkel-Meadow, *supra* note 10; Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings L.J. 9, 36-41 (1996).

21. *See, e.g.,* Carney v. Santa Cruz Women Against Rape, 221 Cal. App. 3d 1009, 1023, 271 Cal. Rptr. 30 (1990); *see also* authorities cited in note 12 *supra.*

22. *See generally* Brazil, *supra* note 8, at 996. In the context of the corresponding federal provision, Judge Brazil explains:

> By leaving open the possibility that settlement communications could be admitted for any one of an almost limitless number of other purposes, the drafters of the rule in essence eviscerated the privilege rationale that they purported to find so 'consistently impressive' and that they intended to make the principal underpinning of the newly formulated rule. The protection of rule 408 virtually evaporates; there are so many conceivable purposes for which settlement communications might be admissible, and counsel easily can argue that they cannot determine whether there is some permissible purpose for which the communications might be admissible at trial unless they can discover their contents.… [T]he drafters constructed a rule that is unfaithful to its own rationale.

23. *See generally* J. Michaels, *Rule 408: A Litigation Mine Field*, Litigation, Fall 1992, at 34 ("Too often viewed as an unambiguous exclusionary rule, a sure protection, Rule 408 is actually a trap.").

24. As one commentator recently explained, the rule that compromise evidence is inadmissible on the issue of liability "provides great incentive to find creative ways to recharacterize compromise evidence …. If this recharacterization is successful, evidence that might clearly show liability for or invalidity of a claim or its amount, and thus directly conflict with the rule's primary purpose, may still be admissible." Kerwin, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 Review of Litigation 665, 668 (1993).

disingenuously, admitting such evidence can result in distortion of the litigation process and injustice.

RECOMMENDATIONS

Balancing the competing considerations in protecting evidence of settlement negotiations is a delicate endeavor. The detriments of excluding potentially relevant evidence must be weighed against the benefits of fairness and promoting mutually satisfactory settlements.[25] To achieve these benefits, the Commission recommends the following reforms:

Purposes for Introducing Evidence of Settlement Negotiations

As a general rule, evidence of settlement negotiations should be inadmissible. This will encourage openness and enhance rationality in settlement negotiations. This, in turn, will promote early settlements, as well as settlements that are more likely to be mutually satisfactory and durable than ones grounded on speculation as to opposing views.[26] The new rule will also be fairer than existing law, because a person could not be penalized for offering to settle.

This general rule should be subject to a number of exceptions. In each of the following situations, if a court admits evidence of settlement negotiations, it should attempt to minimize the scope of settlement negotiation evidence admitted, so as to prevent chilling of candid settlement negotiations.

Partial satisfaction of undisputed claim or acknowledgment of preexisting debt. Evidence of partially satisfying a claim without questioning its validity may be admissible if that evidence is offered to prove the validity of the claim.[27] Similarly, a debtor's payment or promise to pay all or part of a preexisting debt may be admissible when a party offers that evidence to prove the creation of a new duty or revival of the debtor's preexisting duty.[28] These limitations are consistent with the goal of promoting settlement: If a claim is undisputed or a debt acknowledged, there is no dispute to settle and no need to provide confidentiality.

Illegality, misconduct, or other irregularity in the negotiations. Evidence of settlement negotiations should be admissible to show, or to rebut a contention of, misconduct or irregularity in the negotiations. The public policy favoring

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25. *See generally* Leonard, *supra* note 9, § 3.4, at 3:44.

26. Some authorities maintain that we should not blindly promote settlement but focus on promoting "desirable" settlements. *See, e.g.*, Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619 (1995); Gallanter & Cahill, *Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994). By encouraging early settlements based on candid exchange of information, the proposed rule would serve that end. *See generally* Folberg, Rosenberg & Barrett, *supra* note 10, at 351 ("We need a justice system that encourages satisfactory settlements early in the process, thereby minimizing costs for both the parties and the state, and resulting in informed decisions and perceived fairness.").

27. Section 1152(c)(1).

28. Section 1152(c)(2).

settlement has limited force as to settlements and settlement overtures that involve illegality or other misconduct or irregularity.[29] For example, evidence of a low settlement offer should be admissible to establish an insurer's bad faith in first party bad faith insurance litigation. Likewise, evidence of settlement negotiations should be admissible to show fraud, duress, mistake, malpractice, or libel in the negotiations.

Obtaining benefits of settlement. Evidence of a settlement should be admissible to bar reassertion of a claim or enforce the settlement. This exception is essential if parties are to enjoy the benefits of settling a dispute.[30] Conversely, evidence of settlement negotiations should be admissible to rebut an attempt to enforce a settlement, as by showing that there was no settlement.

Good faith settlement barring contribution or indemnity. Evidence of settlement negotiations should be admissible to prove or disprove the good faith of a settlement. This exception follows from the rule that a good faith settlement between a plaintiff and a joint tortfeasor or co-obligor bars "any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."[31]

Sliding scale recovery. A sliding scale recovery agreement is one between a plaintiff and a tortfeasor defendant, under which the defendant's liability depends on how much the plaintiff recovers from another defendant at trial.[32] If the first defendant testifies at trial, the testimony may affect how much that defendant has to pay. The potential effect may consciously or subconsciously influence the defendant's testimony. Because of the danger of bias, evidence of a sliding scale recovery agreement should be admissible, but only if a defendant party to the agreement testifies and the evidence is introduced to show the bias of that defendant.[33]

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29. *See generally* Leonard, *supra* note 9, § 3.7.4, at 3:97 ("If the primary purpose of the exclusionary rule is to encourage parties to reach compromise and thus avoid protracted litigation, it follows that the rule should not apply to situations in which the compromise the parties have reached, or have sought to reach, is illegal or otherwise offends some aspect of public policy.").

30. *See generally id.*, § 3.8.1, at 3:120-22 ("[T]he law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible.").

31. Code Civ. Proc. § 877.6(c). The exception should apply not only when evidence of settlement negotiations is introduced pursuant to Code of Civil Procedure Section 877.6, but also when such evidence is introduced pursuant to a comparable provision of another jurisdiction.

32. Code Civ. Proc. § 877.5(b).

33. Code of Civil Procedure Section 877.5(a)(2) provides additional safeguards for use of a sliding scale recovery agreement:

> If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that this disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.
>
> The jury disclosure herein required shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness.

Danger of death or substantial bodily harm. Evidence of settlement negotiations should be admissible if a participant in the negotiations reasonably believes that disclosure is necessary to prevent a criminal act that is likely to result in death or substantial bodily harm. For example, such evidence may be relevant to obtaining a restraining order against a battering boyfriend.

Admissibility by agreement of all parties. Finally, evidence of settlement negotiations should be admissible if all parties to the negotiations expressly agree in writing that the evidence may be admitted.

Discoverability of Settlement Discussions

Because Sections 1152 and 1154 only bar use of compromise evidence on the issue of liability, counsel can readily argue for discovery of such evidence on the ground that it may be admissible for some other purpose.[34] But any potential intrusion on confidentiality, whether in trial, in discovery, or apart from the litigation process (e.g., a disclosure to a news reporter or a tip to a police officer), may inhibit candid settlement discussions.

To effectively serve the goal of promoting mutually satisfactory settlement, the proposed law would make evidence of a settlement negotiation confidential and protect such evidence from discovery, but only if the participants execute an agreement in writing, before the negotiation begins, setting out the text of the stature and stating that the provision applies to the negotiation. This protection would be subject to essentially the same exceptions as for admissibility (partial satisfaction of undisputed claim or acknowledgment of preexisting debt; illegality, misconduct, or other irregularity in the negotiations; obtaining benefits of settlement; good faith; danger of death or substantial bodily harm; admissibility by agreement of all parties).

Settlement agreements, as opposed to settlement offers and associated negotiations, present special considerations. For example, suppose a manufacturing plant allegedly emits a hazardous chemical and a nearby resident sues for resultant injuries. If the manufacturer and the victim enter into a purportedly confidential settlement agreement, it may be important to resolve whether other persons, particularly other victims or potential victims, are entitled to disclosure of the agreement. Such issues are controversial[35] and this proposal does not address them. The new standard for discovery of settlement negotiations would not apply to discovery of settlement agreements.

The new standard also has an exception to prevent disputants from using settlement negotiations to shield materials from discovery and use at trial. Evidence that would otherwise be admissible or subject to discovery would not be

34. *See* Brazil, *supra* note 8, at 996.

35. *See, e.g.*, Senate Bill 701, introduced by Senator Lockyer in 1991. The Legislature passed the bill but the Governor vetoed it.

rendered inadmissible or protected from disclosure solely by reason of its introduction or use in a settlement negotiation.

Application to Criminal Cases

Sections 1152 and 1154 do not expressly state whether evidence of efforts to compromise a civil case is inadmissible only for purposes of proving civil liability, or also for purposes of a criminal prosecution. This is a very different question from whether to provide evidentiary protection for efforts to compromise a criminal case (i.e., plea bargaining). The latter issue is explicitly covered to some extent by other provisions[36] and is not encompassed in this proposal.[37]

Case law on invoking Section 1152 or 1154 to exclude evidence in a criminal case suggests that the provisions do not apply in a criminal case.[38] The statutory references to proving "liability for the loss or damage" (Section 1152) and "invalidity of the claim" (Section 1154) tend to support that interpretation, because such nomenclature is usually used in the civil and not the criminal context.[39]

Where the same conduct is subject to both civil and criminal prosecution, however, the defendant will be reluctant to engage in efforts to compromise the civil case, if evidence of those efforts will be admissible in the criminal case. As a result, resolution of the victim's suit for restitution or other relief may be delayed until after the defendant's assets are depleted by defending against the criminal charges. The victim's quest for relief becomes a fruitless expenditure of personal and judicial resources.

The proposed legislation would address this problem by making the new restrictions on admissibility and disclosure of efforts to compromise a civil case applicable in criminal actions, as well as in noncriminal proceedings. The restrictions would not apply, however, to settlement negotiations amounting to an obstruction of justice (e.g., an offer to pay civil damages to a rape victim in exchange for false testimony in the criminal case or an agreement not to cooperate with the prosecution).[40]

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36. See Sections 1153, 1153.5.

37. See proposed Section 1130 (application of chapter), *infra.*

38. See *People v. Muniz*, 213 Cal. App. 3d 1508, 1515, 262 Cal. Rptr. 743 (1989), in which the defendant contended that his offer to pay for certain medical expenses was inadmissible under Section 1152. The trial court disagreed and the court of appeal affirmed, stating:

> Muniz would have use read into the statute the word "criminal" as an alternative modifier for liability yet offers no reason for use to do so. Nor does the case law interpreting Evidence Code Section 1152 supply any support for the notion that the statute has any application to criminal cases.

Id. See also Manko v. United States, 87 F.3d 50 (2d Cir. 1996) (Federal Rule 408 "does not exclude relevant evidence in a criminal prosecution even where that evidence relates to the settlement of a civil claim"); United States v. Prewitt, 34 F.3d 436 (7th Cir. 1994) (Federal Rule 408 "should not be applied to criminal cases").

39. *See, e.g.*, D. Leonard, *supra* note 9, § 3.7.3, at 3:94-95 & 3:95 nn. 114-15; 23 C. Wright & K. Graham, Jr., Federal Practice and Procedure: Evidence § 5306, at 217 (1980).

40. There is scholarly support for this approach. *See* D. Leonard, *supra* note 9, § 3.7.3, at 3:88-97 & 3:96 nn. 120, 122. *See also* C. Mueller & L. Kirkpatrick, Federal Evidence § 135, at 91, § 138 at 104-07 & 105

The Commission recognizes that extending the new rules to the criminal context calls for consideration of the Truth-in-Evidence provision of the Victims' Bill of Rights, which states in part that "relevant evidence shall not be excluded in any criminal proceeding."[41] This requirement is not absolute.[42] In particular, the Legislature may establish exceptions by a two-thirds vote.[43] The Legislature should exercise that authority here, because the proposed rules on admissibility and discoverability of settlement negotiations are consistent with, and would promote, a fundamental purpose of the Victims' Bill of Rights: protecting the restitutionary interests of crime victims.[44]

Humanitarian Conduct

Section 1152 includes, and does not differentiate between, offers stemming from "humanitarian motives" and offers reflecting a desire to compromise. There is little case law on the protection of humanitarian conduct. The rule is intended to encourage acts such as an unselfish offer to pay another person's medical expenses. Because the rationale for protecting humanitarian conduct differs from the rationale for protecting settlement negotiations, the Commission recommends covering such conduct in a separate provision, as in the Federal Rules of Evidence.[45]

The proposed provision would make evidence of "furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury" inadmissible to prove liability for the injury.[46] The rule would not extend to associated conduct or statements, because they are likely to be incidental, not in furtherance of the offer.[47]

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n. 17 (2d ed. 1994); 2 J. Weinstein & M. Berger, Weinstein's Evidence 408[01], at 408-17; 23 Wright & Graham, *supra* note 38, § 5306, at 217. Federal Rule of Evidence 408 expressly states that exclusion of compromise evidence is not required when the evidence is offered to prove "an effort to obstruct a criminal investigation or prosecution." Cases construing that rule may provide guidance in interpreting the proposed legislation.

41. Cal. Const. art. I, § 28(d).

42. The Truth-in-Evidence provision does not "affect any existing statutory or constitutional right of the press" and does not "affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103." Cal. Const. art. I, § 28(d).

43. *Id.* A similar two-thirds vote requirement exists in the Crime Victims Justice Reform Act, which governs discovery in a criminal case. See Initiative Measure (Prop. 115), § 30, approved June 5, 1990. The requirement may apply to the proposed provision on the extent to which settlement negotiations are discoverable in a criminal case.

44. *See* Cal. Const. art. I, § 28 (a)-(b); *see also* Cal. Ballot Pamphlet 34 (June 8, 1982).

45. See Fed. R. Evid. 409.

46. This is similar to the language in Rule 409 of the Federal Rules of Evidence.

47. In contrast, broad protection of statements relating to an offer of compromise is necessary, because communication "is essential if compromises are to be effected." Fed. R. Evid. 409 advisory committee's note.

PROPOSED LEGISLATION

☞ **Staff Note.** The existing evidentiary statutes on settlement negotiations (Evid. Code §§ 1152, 1154) are in Division 9 (Evidence Affected or Excluded by Extrinsic Policies). In light of the Commission's decision to strongly protect the confidentiality of settlement negotiations, the staff considered moving the statutes on settlement negotiations to Division 8 (Privileges). The staff did not do so in this draft, because:

(1) Mediation is a special kind of settlement negotiation, so the evidentiary rules for mediation should be near the ones for settlement negotiations. Moving the provisions on mediation confidentiality to Division 8 (Privileges) may encounter resistance, because careful redrafting would be necessary to account for the general provisions on privileges (Sections 900-920).

(2) The privileges in Division 8 automatically receive almost absolute protection from disclosure, whereas the attached draft would protect settlement negotiations from disclosure (as opposed to admissibility) only if there is a written agreement to that effect. Once the Commission determines the appropriate level of protection for settlement negotiations, it should be easier to assess whether the relevant provisions belong in Division 8.

(3) The relationship between participants in a settlement negotiation is quite different from most, but not all, of the relationships protected by the statutes in Division 8. As Judge Brazil comments:

> The traditional privileges attach to communications between persons who have ongoing, *supportive,* interdependent, nonadversarial relationships (*e.g.,* between priest and penitent, husband and wife, doctor and patient, lawyer and client). One purpose of the traditionally recognized privileges is to strengthen these relationships, relationships that society has an interest in fostering. Parties to settlement negotiations, in sharp contrast, are by definition adversaries. While in a small percentage of cases they may end up with ongoing relationships, society usually has no independent interest in nurturing close ties between adverse litigants, at least none that parallels the kind of societal interest that inspires the traditional privileges.
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> [Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings Law Journal 955, 990 (1988) (emph. in original).]

Evid. Code §§ 1130-1141 (added). Settlement negotiations

SEC. ____. Chapter 3 (commencing with Section 1130) is added to Division 9 of the Evidence Code, to read:

CHAPTER 3. SETTLEMENT NEGOTIATIONS

§ 1130. Application of chapter

1130. (a) This chapter governs the admissibility, discoverability, and confidentiality of "settlement negotiations," which are negotiations to settle a pending or prospective civil case. As used in this chapter, "settlement negotiations" means any of the following:

(1) Furnishing, offering, or promising to furnish money or any other thing, act, or service to another person who has sustained or will sustain or claims to have sustained or claims will sustain loss or damage.

(2) Accepting, offering, or promising to accept money or any other thing, act, or service in satisfaction of a claim.

(3) Conduct or statements made for the purpose of, or in the course of, or pursuant to negotiation of an action described in paragraph (1) or (2), regardless of whether a settlement is reached or an action included in paragraph (1) or (2) occurs.

(b) This chapter does not apply to either of the following:

(1) Plea bargaining, regardless of whether that bargaining may also be "settlement negotiations" within the meaning of subdivision (a).

(2) Evidence of an effort to obstruct a criminal investigation or prosecution, regardless of whether that effort may also be "settlement negotiations" within the meaning of subdivision (a).

Comment. Section 1130 states the scope of this chapter. The chapter encompasses, but is not limited to, judicially-supervised settlement negotiations in a civil case, such as a settlement conference pursuant to California Rule of Court 222 (1997).

Subdivision (a)(1) of Section 1130, coupled with subdivision (a)(3), is comparable to former Section 1152. Subdivision (a)(2), coupled with subdivision (a)(3), is comparable to former Section 1154. For protection of settlement negotiations, see Sections 1131 (admissibility of settlement negotiations), 1132 (confidentiality and discoverability of settlement negotiations).

As subdivision (b) recognizes, evidentiary protection of plea bargaining, is covered by other provisions. See Sections 1153 (offer to plead guilty or withdrawn guilty plea), 1153.5 (offer for civil resolution of crimes against property). Where a civil case is related to a criminal prosecution, negotiations to settle the civil case are within the scope of this chapter, but the chapter does not apply to plea bargaining or an effort to obstruct a criminal investigation or prosecution (e.g., an offer to pay civil damages to a rape victim in exchange for false testimony in the criminal case or an agreement not to cooperate with the prosecution). The latter limitation is drawn from Rule 408 of the Federal Rules of Evidence. For background, see D. Leonard, The New Wigmore: A Treatise on Evidence *Selected Rules of Limited Admissibility* § 3.7.3, at 3:91-97 (1996).

For settlement of an administrative adjudication, see Gov't Code § 11415.60. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152.

§ 1131. Admissibility of settlement negotiations

1131. Except as otherwise provided by statute:

(a) Evidence of settlement negotiations is not admissible in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

[(b) Evidence of settlement negotiations is not admissible in a criminal action.]

Comment. Subdivision (a) of Section 1131 supersedes former Sections 1152(a) and 1154, which made evidence of a settlement negotiation inadmissible for the purpose of proving invalidity of the claim, but not for other purposes. To preclude abuse and foster greater candor in settlement negotiations, Section 1131 makes evidence of settlement negotiations in a pending or prospective civil case generally inadmissible in a subsequent noncriminal proceeding.

Under subdivision (b), evidence of settlement negotiations in a pending or prospective civil case is generally inadmissible in a subsequent criminal action. See Section 130 ("criminal action" includes criminal proceedings). This provision does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1130 (application of chapter). For evidentiary protection of plea bargaining, see Sections 1153 (offer to plead guilty or withdrawn guilty plea), 1153.5 (offer for civil resolution of crimes against property).

For exceptions to Section 1131, see Sections 1133 through 1140. Evidence satisfying one or more of these exceptions is not necessarily admissible. It may still be subject to exclusion under other rules, including the balancing test of Section 352. See also Section 1141 (extent of evidence admitted or subject to disclosure).

For guidance on confidentiality and discoverability of settlement negotiations, see Section 1132. For settlement of an administrative adjudication, see Gov't Code § 11415.60. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152 (payment of medical or other expenses).

☞ **Staff Note.** Subdivision (b) of Section 1131 would make evidence of efforts to compromise a civil case inadmissible for purposes of a criminal prosecution. The reasoning underlying this approach is explained at page 9 of the preliminary part:

> Where the same conduct is subject to both civil and criminal prosecution, …the defendant will be reluctant to engage in efforts to compromise the civil case, if evidence of those efforts will be admissible in the criminal case. As a result, resolution of the victim's suit for restitution or other relief may be delayed until after the defendant's assets are depleted by defending against the criminal charges. The victim's quest for relief becomes a fruitless expenditure of personal and judicial resources.
>
> The proposed legislation would address this problem by making the new restrictions on admissibility and disclosure of efforts to compromise a civil case applicable in criminal actions, as well as in noncriminal proceedings.

Restricting admissibility in criminal cases is a big step, one that the Legislature has not taken even with regard to mediation communications. In determining whether to continue with this approach, the Commission should weigh the significance of the problem it is trying to address, the potential for controversy, the likelihood of satisfying the two-thirds vote requirement mandated by the Truth-in-Evidence provision of the Victims' Bill of Rights (see page 10 of the preliminary part), the possibility of referral to two policy committees in each house (Public Safety and Judiciary), and the impact of the provision on prospects for enactment of the remainder of the Commission's proposal. Professor David Leonard believes that judges should be permitted to exclude evidence of settlement negotiations (other than an effort to obstruct a criminal investigation or prosecution) in criminal as well as civil cases. (First Supplement to Memorandum 96-59, Exhibit pp. 2-3.) The staff tends to agree with this as an intellectual matter, but urges the Commission to carefully assess and consider the practical implications of attempting this type of reform.

§ 1132. Confidentiality and discoverability of settlement negotiations

1132. (a) Except as otherwise provided by statute, evidence of settlement negotiations is confidential and is not subject to discovery, [in a criminal action or] in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) This section applies only if the persons participating in a negotiation execute an agreement in writing, before the negotiation begins, which sets out the text of this section and states that the section applies to the negotiation.

(c) This section does not apply to evidence of a settlement agreement. Nothing in this section expands or limits existing law on discovery of a settlement agreement.

Comment. To promote candor in settlement negotiations, Section 1132 makes such negotiations confidential and restricts discovery of such negotiations, subject to statutory exceptions.

Under subdivision (a), evidence of settlement negotiations in a pending or prospective civil case is, with limitations, confidential and not subject to discovery in a subsequent criminal action

or noncriminal proceeding. See Section 130 ("criminal action" includes criminal proceedings). This provision does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1130 (application of chapter). For evidentiary protection of plea bargaining, see Sections 1153 (offer to plead guilty or withdrawn guilty plea), 1153.5 (offer for civil resolution of crimes against property).

Under subdivision (b), a written agreement is necessary to invoke the protection of subdivision (a).

Subdivision (c) makes clear that although Section 1132 restricts discovery of settlement negotiations, the provision does not apply to discovery of a settlement agreement and thus does not affect whether and to what extent the existence and terms of such an agreement may be kept confidential. For other exceptions to Section 1132, see Sections 1133-1137, 1139, 1140.

For settlement of an administrative adjudication, see Gov't Code § 11415.60. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152 (payment of medical or other expenses).

☞ **Staff Note.** For whether to include criminal cases in subdivision (a), see the Staff Note on proposed Section 1131.

§ 1133. Evidence otherwise admissible or subject to discovery

1133. Evidence otherwise admissible or subject to discovery independent of a settlement negotiation is not inadmissible, confidential, or protected from disclosure under Section 1131 or 1132 solely by reason of its introduction or use in the negotiation.

Comment. Section 1133 is drawn from Section 1152.5(a)(6) and Federal Rule of Evidence 408. See Section 1130 (application of chapter).

§ 1134. Partial satisfaction of undisputed claim or acknowledgment of preexisting debt

1134. (a) Section 1131 does not affect the admissibility of either of the following:

(1) Evidence of partial satisfaction of an asserted claim or demand made without questioning its validity where the evidence is offered to prove the validity of the claim.

(2) Evidence of a debtor's payment or promise to pay all or a part of the debtor's preexisting debt where the evidence is offered to prove the creation of a new duty on the debtor's part or a revival of the debtor's preexisting duty.

(b) Section 1132 does not affect the discoverability of either of the following:

(1) Evidence of partial satisfaction of an asserted claim or demand made without questioning its validity.

(2) Evidence of a debtor's payment or promise to pay all or a part of the debtor's preexisting debt.

Comment. Subdivision (a) of Section 1134 continues former Section 1152(c) without substantive change. Subdivision (b) applies the same principle in the context of discovery.

§ 1135. Misconduct or irregularity

1135. (a) Evidence of settlement negotiations is not inadmissible under Section 1131 where the evidence is introduced to show, or to rebut a contention of, fraud, duress, illegality, mistake, malpractice, libel, breach of the covenant of good faith and fair dealing, or other misconduct or irregularity in the negotiations.

(b) Evidence of, or evidence to rebut a contention of, fraud, duress, illegality, mistake, malpractice, libel, breach of the covenant of good faith and fair dealing, or other misconduct or irregularity in settlement negotiations is not protected from disclosure under Section 1132.

Comment. Section 1136 recognizes that the public policy favoring settlement agreements has limited force with regard to settlement agreements and offers that derive from or involve illegality or other misconduct or irregularity. See D. Leonard, The New Wigmore: A Treatise on Evidence *Selected Rules of Limited Admissibility* § 3.7.4, at 3:97 (1996) ("If the primary purpose of the exclusionary rule is to encourage parties to reach compromise and thus avoid protracted litigation, it follows that the rule should not apply to situations in which the compromise the parties have reached, or have sought to reach, is illegal or otherwise offends some aspect of public policy."). For example, evidence of a low settlement offer should be admissible to establish an insurer's bad faith in first party bad faith insurance litigation.

See Section 1130 (application of chapter). See also Section 1141 (extent of evidence admitted or subject to disclosure).

☞ **Staff Note.**

(1) *Comparison to attorney-client privilege.* Proposed Section 1135 is similar to, but much broader than, the crime or fraud exception to the attorney-client privilege (Evid. Code § 956), which reads:

> 956. There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

The staff believes that the additional breadth is necessary in the context of settlement negotiations. The Commission took this approach in the tentative recommendation that was circulated last year.

(2) *Bad faith insurance litigation.* The Civil and Small Claims Advisory Committee of the Judicial Council comments (Memorandum 98-14, Exhibit pp. 1-2):

> [I]n the draft proposal presented to us, the commission … did not expressly exclude from the broad confidentiality provisions evidence of bad faith by an insurance company. In first party bad faith insurance cases, evidence of "low-ball" settlement offers is often a prime indicator of bad faith by the insurance company and in many cases it becomes a centerpiece of the evidence. The committee feels that the commission should not recommend changes which would alter the well-established caselaw on first party bad faith insurance litigation.

Although Section 1135 does not expressly refer to the insurance context, it does make evidence of settlement negotiations admissible to show "breach of the covenant of good faith and fair dealing." To address the concern raised, the staff added a sentence on insurance litigation to the Comment. We have also expanded the discussion in the preliminary part (pages 6-7). Are these revisions sufficient? Can anyone suggest a better approach?

(3) Wayne Brazil (Magistrate Judge, U.S. District Court, Northern District of California) has expressed concern about whether this exception for misconduct or irregularity is broad enough to allow admission of evidence demonstrating whether a party participated in good faith in a court-ordered alternative dispute resolution program. As he states, "to determine whether a party or lawyer should be sanctioned for failing to participate in good faith in a court-sponsored ADR proceeding," he "must order the parties to disclose the contents of communications made and nature of acts taken during the course of the settlement-oriented proceeding." (Memorandum 97-74, Exhibit p. 4.) He suggests explicitly addressing this issue in the Comment to Section 1135.

This is an important, but difficult, issue. Allowing courts to inquire into whether parties complied in good faith with orders to participate in court-annexed settlement programs may undermine the assurance of confidentiality necessary to promote candid discussion and achieve settlement. Perhaps more importantly, the extent to which parties may be compelled to participate in alternative dispute resolution is controversial. Thus, it may be unwise to expressly make evidence of settlement negotiations admissible to establish whether a party complied in good faith with an order to participate in alternative dispute resolution.

On the other hand, there are a great variety of such programs, as well as persons who believe in requiring and being able to obtain proof of good faith compliance. Consequently, it may also be inadvisable to state unequivocally that evidence of settlement negotiations is not admissible for that purpose.

How do we solve this conundrum?

One possibility would be to remain silent on the issue and leave it to the courts. This would be unsatisfying from the standpoint of providing guidance, but it may be the best hope of avoiding controversy. It would also allow the courts to consider the issue in concrete factual contexts. It is, however, likely that courts will conclude that they have the power to inquire into good faith compliance with court-ordered ADR.

Another possibility at this stage of the study would be to solicit input on the issue in the revised tentative recommendation and then revisit the issue once we have more information. The staff recommends this approach, although it has the potential of alerting persons to grounds for opposition. If there are objections, it would be better to learn of them now, rather than late in the legislative process.

(4) *Professional misconduct.* A similar issue, also raised by Judge Brazil (Memorandum 97-74, Exhibit pp. 4-5), is professional misconduct (e.g., violation of the State Bar Rules of Professional Conduct). There is a danger that invading the privacy of settlement negotiations to assess professional misconduct would seriously inhibit such negotiations, because professional misconduct is a broad concept. Nonetheless, the staff is inclined to expressly mention professional misconduct in Section 1135. Otherwise, professional misconduct in settlement negotiations may be difficult if not impossible to redress.

§ 1136. Obtaining benefits of settlement

1136. (a) Evidence of settlement negotiations is not inadmissible under Section 1131 where either of the following conditions is satisfied:

(1) The evidence is introduced to enforce, or to rebut an attempt to enforce, a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

(2) The evidence is introduced to show, or to rebut an attempt to show, the existence of a settlement barring the claim that is the subject of the settlement negotiations.

(b) Evidence of settlement negotiations is not protected from disclosure under Section 1132 where either of the following conditions is satisfied:

(1) The evidence is relevant to enforcement of a settlement or showing the existence of a settlement barring a claim.

(2) The evidence is relevant to rebutting an attempt to enforce a settlement or rebutting an attempt to show the existence of a settlement barring a claim.

Comment. Section 1136 seeks to ensure that parties enjoy the benefits of settling a dispute. For background, see generally D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.8.1, at 3:120-22 (1996) (“the law would hardly encourage

compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible.").

See Section 1130 (application of chapter). See also Section 1141 (extent of evidence admitted or subject to disclosure).

§ 1137. Good faith settlement barring contribution or indemnity

1137. (a) Evidence of settlement negotiations is not inadmissible under Section 1131 where the evidence is introduced pursuant to Section 877.6 of the Code of Civil Procedure or a comparable provision of another jurisdiction to show, or to rebut an attempt to show, lack of good faith of a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

(b) Evidence of settlement negotiations is not protected from disclosure under Section 1132 where either of the following conditions is satisfied:

(1) The evidence is relevant to showing, pursuant to Section 877.6 of the Code of Civil Procedure or a comparable provision of another jurisdiction, lack of good faith of a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

(2) The evidence is relevant to rebutting a claim, pursuant to Section 877.6 of the Code of Civil Procedure or a comparable provision of another jurisdiction, of lack of good faith of a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

Comment. Section 1137 follows from the rule that a good faith settlement between a plaintiff and a joint tortfeasor or co-obligor bars claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. Code Civ. Proc. § 877.6(c).

See Section 1130 (application of chapter). See also Section 1141 (extent of evidence admitted or subject to disclosure).

§ 1138. Sliding scale recovery agreement

1138. Evidence of a sliding scale recovery agreement, as defined in Code of Civil Procedure Section 877.5, is not inadmissible under Section 1131 where a defendant party to the agreement testifies and the evidence is introduced to show bias of that defendant.

Comment. Section 1138 provides an exception to Section 1131 (admissibility of settlement negotiations), in recognition of the danger of bias inherent in a sliding scale recovery agreement. Code of Civil Procedure Section 877.5(a)(2) provides additional safeguards for use of a sliding scale recovery agreement.

See Section 1130 (application of chapter). See also Section 1141 (extent of evidence admitted or subject to disclosure).

☞ **Staff Note.** Is it necessary to expand this exception for proof of bias? For instance, suppose a defendant and a key witness have entered into a settlement agreement that requires the defendant to pay a substantial sum to the witness at a later date. Suppose further that the defendant has limited assets, creating an incentive for the witness to slant his story in favor of the defendant, so as to avoid having to compete with another creditor. Should the jury be made aware of this potential for bias?

One possibility would be to make evidence of a settlement agreement, but not evidence of other settlement negotiations, admissible for purposes of showing bias of a party to the agreement:

1138. Evidence of a settlement agreement is not inadmissible under Section 1131 where the evidence is introduced to show bias of a party to the agreement.

Comment. Section 1138 provides an exception to Section 1131 (admissibility of settlement negotiations), in recognition that a settlement agreement may be compelling evidence of bias. The danger of bias is particularly strong where there is a sliding scale recovery agreement and a defendant party to the agreement testifies. See Code Civ. Proc. § 877.5(a)(2) (additional safeguards for use of a sliding scale recovery agreement).

See Section 1130 (application of chapter). See also Section 1141 (extent of evidence admitted or subject to disclosure).

Another possibility would be to make Section 1131 (admissibility of settlement negotiations) inapplicable to a settlement agreement, just as Section 1132 (confidentiality and discoverability of settlement negotiations) is inapplicable to a settlement agreement. The staff recommends against this approach, because there are circumstances in which a settlement agreement should be inadmissible. For example, suppose a defendant settles with Plaintiff A but not with Plaintiff B. The settlement agreement between the defendant and Plaintiff A should not be admissible to prove that the defendant is liable to Plaintiff B. If Section 1131 was inapplicable to settlement agreements, however, there would be no basis for exclusion.

§ 1139. Danger of death or substantial bodily harm

1139. Evidence of settlement negotiations is not inadmissible under Section 1131, or confidential and protected from disclosure under Section 1132, if a participant in the negotiations reasonably believes that disclosure is necessary to prevent a criminal act that is likely to result in death or substantial bodily harm.

Comment. Section 1139 is drawn from Section 956.5, pertaining to the attorney-client privilege.

☞ **Staff Note.** For the Commission's reference, Evidence Code Section 956.6 reads:

> 956.6. There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

§ 1140. Admissibility and disclosure by agreement of all parties

1140. Evidence of settlement negotiations is not inadmissible under Section 1131, or confidential and protected from disclosure under Section 1132, if all parties to the negotiations expressly agree in writing that the evidence may be admitted or disclosed.

Comment. Section 1140 is drawn from Section 1122, pertaining to mediation confidentiality. See Section 1130 (application of chapter).

§ 1141. Extent of evidence admitted or subject to disclosure

1141. (a) A court may not admit evidence pursuant to Section 1135, 1136, 1137, 1138, or 1139, where the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury.

(b) In ordering disclosure of evidence of settlement negotiations pursuant to Section 1135, 1136, 1137, or 1139, a court shall attempt to minimize the extent of disclosure, consistent with the needs of the case, so as to prevent chilling of candid settlement negotiations.

Comment. Subdivision (a) of Section 1141 is drawn from Section 352. Exclusion pursuant to Section 1141 is mandatory, not discretionary. To prevent unnecessary chilling of settlement negotiations, Section 1141 requires a court to minimize the scope of admitted settlement negotiation evidence. For example, if the evidence is offered to rebut a defense of laches, it may only be necessary to admit evidence that ongoing potentially productive settlement negotiations occurred, without getting into the details of those negotiations. *See* D. Leonard, The New Wigmore: A Treatise on Evidence *Selected Rules of Limited Admissibility* § 3.8.3, at 3:145-46 (1996). Under subdivision (b), the same principle applies to discovery of settlement negotiations.

Heading of Chapter 3 (commencing with Section 1150) (amended)

SEC. ____. The heading of Chapter 3 (commencing with Section 1150) of Division 9 of the Evidence Code is amended to read:

CHAPTER ~~3~~ 4. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

Evid. Code § 1152 (repealed). Offers to compromise

SEC. ____. Section 1152 of the Evidence Code is repealed.

~~1152. a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.~~

~~(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.~~

~~(c) This section does not affect the admissibility of evidence of any of the following:~~

~~(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.~~

~~(2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.~~

Comment. Former Section 1152 is superseded by Sections 1130-1141 (settlement negotiations), 1152 (payment of medical or other expenses).

Evid. Code § 1152 (added). Payment of medical or other expenses

SEC. ____. Section 1152 is added to the Evidence Code, to read:

1152. Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury is not admissible to prove liability for the injury.

Comment. Section 1152 is drawn from Federal Rule of Evidence 409. As to humanitarian conduct, it supersedes former Section 1152. For protection of settlement negotiations, see Sections 1131 (admissibility of settlement negotiations), 1132 (confidentiality and discoverability of settlement negotiations). See also Section 1130 (application of chapter on settlement negotiations). For evidentiary protection of plea bargaining, see Sections 1153 (offer to plead guilty or withdrawn guilty plea), 1153.5 (offer for civil resolution of crimes against property). For settlement of an administrative adjudication, see Gov't Code § 11415.60.

☞ **Staff Note.**

(1) Professor Leonard recommends changing "medical, hospital, or *other* expenses" to "medical, hospital, or *similar* expenses," to conform to the language of Federal Rule of Evidence 409, reducing the potential for litigation and uncertainty. The Commission previously decided to deviate from the federal rule to provide broader coverage. (see February 1997 Minutes, p. 8.) The staff is checking the case law interpreting Federal Rule of Evidence 409 to see which expenses are covered by the rule and which are not. We will report on the results of this research at the March meeting.

(2) Professor Mendez urges the Commission to extend proposed Section 1152 to cover statements associated with offers of humanitarian aid. He explains (Memorandum 97-74, Exhibit p. 6):

> Lawyers will limit their statements to [offers of humanitarian aid], but lay people are likely to say the following: "Look, it was my fault; let me pay your medical bills."
>
> Under your proposal and current law, the first part of the statement can be used as an admission because it was not made as part of an effort to settle the claim; it is simply a "bald" admission. The second part is protected for the reasons you give. But of what value is that protection if such statements are likely [to] be accompanied by other statements that qualify as admissions? Isn't the sense that "I may have been wrong" the inducement for making the humanitarian proposal? Isn't that "sense" also what drives parties through their lawyers to want to settle their cases? Why then protect such statements if made by a lawyer at a settlement conference ("Look, my client admits that it may have been his fault") but not by the defendant if made at the scene of the accident.

The rationale for protecting statements associated with settlement offers, but not statements associated with humanitarian aid, is that the former are likely to be in furtherance of the offer, while the latter are likely to be incidental. Fed. R. Evid. 409 advisory committee's note. As Professor Mendez's comments make clear, however, it seems incongruous to protect statements made by a lawyer offering payment once a claim is made, yet deny the same protection to statements made by an unsophisticated person offering payment where there is no claim. This is essentially a fairness argument.

Professor Leonard disagrees with Professor Mendez, but not strongly. For Professor Leonard, the critical issue is whether the fairness concerns outweigh the interest in allowing a decisionmaker to consider all relevant evidence. The Commission should make its own assessment of that balance.

If the Commission decides to protect conduct or statements associated with offers of humanitarian aid, proposed Section 1152 could be revised along the following lines:

> 1152. Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury, and any associated conduct or statements, is not admissible to prove liability for the injury.
>
> **Comment.** Section 1152 is drawn from Federal Rule of Evidence 409, but it protects statements and conduct associated with an offer of humanitarian aid, as well as the offer itself. As to humanitarian conduct….

Notably, humanitarian conduct is covered by existing Section 1152, which encompasses "conduct or statements made in negotiation" of an offer. Thus, existing California law may already protect conduct or statements associated with humanitarian aid: It depends on whether the phrase "conduct or statements made in negotiation" is construed to apply only to settlement negotiations, or also to discussions of offers made from humanitarian motives (do these amount to "negotiation"?).

Evid. Code § 1154 (repealed). Offer to discount a claim

SEC. ____. Section 1154 of the Evidence Code is repealed.

~~1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.~~

Comment. Former Section 1154 is superseded by Sections 1130-1141 (settlement negotiations).

CONFORMING REVISIONS

Civ. Code. § 1782 (amended). Prerequisites to action for damages

SEC. ____. Section 1782 of the Civil Code is amended to read:

1782. (a) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of this title, the consumer shall do the following:

(1) Notify the person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.

(2) Demand that such person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation of Section 1770.

Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within California, or, if neither will effect actual notice, the office of the Secretary of State of California.

(b) Except as provided in subdivision (c), no action for damages may be maintained under the provisions of Section 1780 if an appropriate correction, repair, replacement or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of such notice.

(c) No action for damages may be maintained under the provisions of Section 1781 upon a showing by a person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 that all of the following exist:

(1) All consumers similarly situated have been identified, or a reasonable effort to identify such other consumers has been made.

(2) All consumers so identified have been notified that upon their request such person shall make the appropriate correction, repair, replacement or other remedy of the goods and services.

(3) The correction, repair, replacement or other remedy requested by such consumers has been, or, in a reasonable time, shall be, given.

(4) Such person has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage, in such methods, act or practices.

(d) An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with the provisions of subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with the provisions of subdivision (a), the consumer may amend ~~his~~ the complaint without leave of court to include a request for damages. The appropriate provisions of subdivision (b) or (c) shall be applicable if the complaint for injunctive relief is amended to request damages.

(e) Attempts to comply with the provisions of this section by a person receiving a demand shall be construed to be ~~a offer to compromise and shall be inadmissible as evidence pursuant to Section 1152 of the Evidence Code; furthermore, such attempts~~ settlement negotiations under Chapter 3 (commencing with Section 1130) of Division 9 of the Evidence Code. Attempts to comply with a demand shall not be considered an admission of engaging in an act or practice declared unlawful by Section 1770. Evidence of compliance or attempts to comply with the provisions of this section may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the provisions of this section.

Comment. Subdivision (e) of Section 1782 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new Evidence Code provisions protecting settlement negotiations. See Evid. Code §§ 1130-1141 (settlement negotiations).

Code Civ. Proc. § 1775.10 (amended). Evidence rules protecting statements in mediation

SEC. ____. Section 1775.10 of the Code of Civil Procedure is amended to read:

1775.10. All statements made by the parties during the mediation ~~shall be~~ are subject to ~~Sections 703.5 and 1152, and Chapter 2 (commencing with Section 1115)~~ Section 703.5, and Chapters 2 (commencing with Section 1115) and 3 (commencing with Section 1130), of Division 9, of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new provisions protecting settlement negotiations. See Evid. Code §§ 1130-1141 (settlement negotiations).

Evid. Code § 822 (amended). Improper bases for opinion as to value of property

SEC. ____. Section 822 of the Evidence Code is amended to read:

822. (a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property:

(1) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain, except that the price or other terms and circumstances of an acquisition of property appropriated to a public use or a property interest so appropriated shall not be excluded under this section if the acquisition was for the same public use for which the property could have been taken by eminent domain.

(2) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding~~; but nothing~~ . Nothing in this subdivision makes admissible evidence that is inadmissible under Chapter 3 (commencing with Section 1130) of Division 9, or permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.

(3) The value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(4) An opinion as to the value of any property or property interest other than that being valued.

(5) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(6) The capitalized value of the income or rental from any property or property interest other than that being valued.

(b) In an action other than an eminent domain or inverse condemnation proceeding, the matters listed in subdivision (a) are not admissible as evidence, and may not be taken into account as a basis for an opinion as to the value of property, except to the extent permitted under the rules of law otherwise applicable.

(c) The amendments made to this section during the 1987 portion of the 1987-1988 Regular Session of the Legislature shall not apply to or affect any petition filed pursuant to this section before January 1, 1988.

Comment. Subdivision (a)(2) of Section 822 is amended to explicitly address its interrelationship with the exclusionary rule for settlement negotiations. See People *ex rel.* Dep't of Public Works v. Southern Pac. Trans. Co., 33 Cal. App. 3d 960, 968-69, 109 Cal. Rptr. 525 (1973) (reconciling Section 822 with former Section 1152).

Evid. Code § 1116 (amended). Effect of chapter on mediation confidentiality

SEC. ____. Section 1116 of the Evidence Code is amended to read:

1116. (a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under ~~Section 1152~~ Chapter 3 (commencing with Section 1130) of Division 9 or any other statute.

Comment. Section 1116 is amended to reflect the repeal of former Section 1152 and the enactment of new provisions protecting settlement negotiations. See Sections 1130-1141 (settlement negotiations).

Gov't Code § 11415.60 (amended). Settlement of administrative adjudication

SEC. ____. Section 11415.60 of the Government Code is amended to read:

11415.60. (a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate. ~~Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage except to the extent provided in Section 1152 of the Evidence Code~~ Chapter 3 (commencing with Section 1130) of Division 9 of the Evidence Code applies to settlement negotiations pursuant to this section. Nothing in this subdivision makes inadmissible any public document created by a public agency.

(b) A settlement may be made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing.

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not

be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.

Comment. Section 11415.60 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new provisions protecting settlement negotiations. See Evid. Code §§ 1130-1141 (settlement negotiations).

Uncodified (added). Operative date

SEC. ____. (a) This act becomes operative on January 1, 2000.

(b) This act applies in an action, proceeding, or administrative adjudication commenced before, on, or after January 1, 2000.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 2000, overruling an objection based on former Section 1152 of the Evidence Code. However, if an action, proceeding, or administrative adjudication is pending on January 1, 2000, the objecting party may, on or after January 1, 2000, and before entry of judgment in the action, proceeding, or administrative adjudication make a new request for exclusion of the evidence on the basis of this act.